IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

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ELIZABETH SINES, et al.,

Plaintiffs,

vs.

JASON KESSLER, et al.,

Defendants.

CIVIL NO.: 3:17-CV-00072
December 17, 2020
MOTION HEARING - VIDEOCONFERENCE

Before:
THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF VIRGINIA

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(Proceedings commenced 10:00 a.m.)

THE COURT: Okay. Heidi, do you know if everyone is on?

THE CLERK: I think we have everybody present. Would you agree, Mr. Bloch and Mr. Kolenich?

COUNSEL: Everybody is here.

THE COURT: You may call the case.

THE CLERK: Yes, Your Honor. This is Civil Action Number 3:17-CV-00072, *Elizabeth Sines* and others versus *Jason Kessler* and others.

THE COURT: Plaintiffs ready?

MR. KOLENICH: Yes. Oh, sorry, Your Honor.

MR. BLOCH: We're ready, sir.

THE COURT: Defendants ready? Okay, thank you.

We're here on the defendants' motion to exclude, but before we begin I will remind any members of the public that under Standing Order 2020-12, the Court's prohibition against recording and broadcasting court proceedings remains in force. Attorneys' staff and members of the public accessing this hearing today may not record or broadcast it.

All right. You may proceed.

MR. KOLENICH: Thank you, Your Honor. Jim Kolenich for the moving defendants. To clarify where we're at with this motion, we have originally moved against three different experts. We've withdrawn that motion as to Lipstadt and

Fenton. We're proceeding only against expert Peter Simi, the joint report of Peter Simi, and Kathleen Blee.

THE COURT: Okay.

MR. KOLENICH: To begin, Your Honor, what we are not doing or attacking is the qualifications of these experts, nor are we attacking, as such, the methodology that they employed in reaching their conclusions.

What we are objecting to comes under the heading of relevance to much of their report. Of course, an expert is required to provide information that helps the trier of fact to understand evidence and determine the facts at issue. However, in doing so, they are not permitted to testify or opine as to witness credibility or legal conclusion.

It's our assertion that this report is basically shot through with an attempt to testify as to witness credibility and also offers legal conclusions.

Now, in making that objection, we do not object to the presentation of data from the record and even some historical data that's not necessarily in the record in this case. That puts the defendants' comments and their activities into historical context. Certainly, that's appropriate and a proper use of expert testimony, so that's not what we're objecting to.

But I'd like to go through certain sections of the expert report now, and it should only take a couple of

minutes, Your Honor, to highlight where the objection is.

I'll begin on page 2 where the experts say: "The coordinated race-based violence facilitated and committed by defendants at UTR" -- which, of course, is the event in question, Unite the Right -- "is emblematic of White -- of WSM tactics." White Supremacist Movement tactics, as they define it.

So we object to the phraseology "White Supremacist Movement". Trying to just use the concept of "movement" implies organization and implies conspiracy, and that is sort of the subject at issue, the allegations in the plaintiffs' complaint which the defendants are denying. So this entire way of framing the expert report is just sort of a sophisticated attack on witness credibility.

Moving on to page 7 of the expert report, they state that all white supremacists embrace and have defended violence as a tactic to achieve a society that they are trying to gain. This is --

THE COURT: Excuse me. What page was that?

MR. KOLENICH: I'm sorry, the bottom of page 7 of the report, Your Honor.

THE COURT: Okay. Are you going to come back and speak to these issues or --

MR. KOLENICH: Well, I'm going to go through them and give them as examples of what we're objecting to.

THE COURT: All right.

MR. KOLENICH: And I think I've got all but maybe one --

THE COURT: Okay.

MR. KOLENICH: -- but may not be the entire list, Your Honor.

THE COURT: Okay.

MR. KOLENICH: Thank you, Judge.

Moving on to page 8: The White Supremacist Movement is coordinated primarily through a common culture that sustains a shared set of interpretations and norms of behavior.

Again, in the context of this report, that plainly refers to violence. The immediately preceding text refers to Aryan Nations, Ku Klux Klan, and other groups that are known to have engaged in criminal violence in the history of the United States.

Moving on to page 10: The rhetoric used by the defendants or some of the defendants allows the White Supremacist Movement to reinforce norms of violence.

Further on page 10, that this rhetoric allows interested individuals -- and in this context I think the individual interest is violence -- to evade detection by legal authorities.

On page 11: The rhetoric creates plausible

deniability for ideas or actions that would attract legal attention and sanction.

On page 12: The rhetoric operates on a broader level to create deception about ideological and strategic direction of the groups and networks.

Page 13: They conceal the advocacy of violence by use of this rhetoric.

Page 14 begins the experts subsection 8. And defendants object to the entirety of subsection 8 with the exception of the historical review contained therein.

Of particular interest on page 19: The WSM -- and they link that to the defendants -- Glorifies Violence. And they go through examples of how they claim they are glorifying violence.

That it Normalizes Violence, on page 20.

Page 26, that they deny that they normalize and glorify violence by use of the rhetoric that defendants engaged in by saying, "I was only joking" and similar type language.

Now, in the midst of this, there's an example of the thing we're not necessarily objecting to. We are aware, of course, that the Court is supposed to allow expert testimony when at all possible under the modern standard. So they block quote something from Defendant Richard Spencer, where he says that "politics is about the use of force." That's the kind of

thing that we are not objecting to, Your Honor. That's the very words of a defendant. That's the words he used. But what we are objecting to is them going on to tell the jury what they are supposed to think about the words, which is what they do throughout this report.

On page 41, it states: "Defendants Utilized Double-Speak When Planning and Organizing Unite the Right."

The clear import of this in the context of the report, Your Honor, is that the defendants' organization was just part of an a priori plan to perpetrate violence and then cover it up. Now, that's not part of the plaintiffs' complaint. Yes, the plaintiffs complain that the defendants planned to engage in violence at Unite the Right, but in practically 200 pages of operative complaint there's nothing about a preexisting plan to cover up the plan. I guess that's sort of implicit in conspiracy, but still that's not something we were charged with coming into the case.

Page 57: "Defendants Recruited Participants That Were Willing to Utilize Violence."

Now, that, again, is attacking witness credibility, attacking the testimony that's already been elicited at depositions regarding what defendants were up to.

Page 58, they have a section titled, "The Violence Planned on Discord Played Out on August 11-12, 2017," in Charlottesville.

Page 60: "The Defendants Ratified Their Use of White Supremacist-Style Violence After the Rally," and they give two quotes of interest. Defendant Damigo: "This was a huge victory for us." And Defendant Parrott: "Aside from having a couple men unfairly held behind the wire, Charlottesville was a tremendous victory."

Both of these men addressed those quotes at deposition and --

(Brief interruption.)

MR. BLOCH: Sorry, Judge, I think we're good. My apologies.

THE COURT: Okay, you may proceed.

MR. KOLENICH: Thank you, Judge.

I believe I was quoting or giving the quote that they assigned to Mr. Parrott. "Aside from having a couple men unfairly held behind the wire, Charlottesville was a tremendous victory."

Again, both of these men dealt with these quotes at deposition and offered alternate explanations, so allowing expert opinion that they are lying in those alternate explanations as part of a conspiracy to conceal their true motives is attacking witness credibility.

Now, the Court doesn't have to accept my spin on this expert report. On page 63 as they conclude their report, they just explicitly tell us that that's what they are doing.

Specifically, the experts state, "In our opinion, this strategy was deliberately weaponized to provoke violence or planted to create a defense in advance of provoking the violent incident," and they give quotes in support of that.

They also conclude, "The intentional use of violence to achieve their goals, and a coordinated strategy to obfuscate their aims through the use of -- quote, unquote -- 'double-speak,'" and various other academic terms is a conspiracy. They've opined that the defendant did conspire and that the defendants are lying about their alternate explanations, right? So that's what I have as to the actual report.

So it's our contention that the use of the phrase "White Supremacist Movement" is itself objectionable, that they should stick with what is commonly found in academic treatises -- racist, extremist, what they call themselves, Nazis, that sort of thing -- rather than attempting to say that there's some movement that these men are a part of which is not even part of the plaintiff's allegations and is not, you know, made more or less likely any element that plaintiff is required to address.

And so legally what we're asserting is that they cannot testify as to witness credibility, as to legal conclusions, and they cannot impose a narrative on the record evidence, create a strawman and impose on the record evidence.

I have just a couple supplementary legal citations I'd like to provide, and then that will conclude my presentation.

All right. As to impermissibility of testifying on witness credibility, we cite *United States v. Dorsey*, 45 F. 3d 809 Fourth Circuit. As to cannot testify as to legal conclusions, *Forest Creek Associates*, 831 F. 2d 1238 Fourth Circuit. And as to the impermissibility of imposing a strawman factual narrative on the record evidence, this is *In Re: Longtop Financial Technicians Limited*, 32 F.Supp 3d 453. That's out of the Southern District of New York.

Thank you, Your Honor. That's all for the moving defendants.

THE COURT: Well, let me ask you this: The Fourth Circuit and I think most courts have upheld the -- that it was proper to put on expert testimony that when one was saying one thing they meant another, such as in the drug cases witnesses will testify he wanted a pound of -- or a gram of girl and a gram of boy, which would mean a gram of cocaine and a gram of heroin. I mean, that's been -- that type of testimony has been admissible for a long time. You don't dispute that, do you?

MR. KOLENICH: No, I don't, Your Honor. I guess the distinction I'm trying to draw is, you know, drug trafficking is a well-known thing. Law enforcement officers make arrests based on if they can testify about it and what goes on with

it.

The defendants in this case organized the political rally, a thing in itself legal, and so there's no history of this -- this kind of double-speak in the context of a political rally that the experts are trying to put in, in contradistinction to drug trafficking and the use of whatever language to conceal themselves from the police.

Here they are concealing -- I'm sorry, Judge.

THE COURT: I'm sorry, I didn't mean to cut you off.

MR. KOLENICH: It's all right. I was just completing the -- adding to on to the thought that this is conceptually distinct from drug trafficking.

THE COURT: Well, the double-speak is throughout history and throughout society no matter what. It's not limited to drugs or... I mean, anyone that's doing something they don't want another person to know about, outsiders to know what they are doing, are apt to use some sort of double-speak that will mean something to them and the person they want to communicate with but would seem innocuous to a third party. I mean, such as where you take a case involving organized crime. If someone, you know, testified that the leader said, "I wish he -- I wish he was in the witness protection program," and you could put on maybe an expert that -- that would know that in that guy's parlance that that

meant that was an order to his underlings to kill the person, I mean, there wouldn't be a problem with that, would there? I mean, it's not limited to drugs. That's what I'm saying.

MR. KOLENICH: No, sir, it's certainly not. I completely agree. And then defense agrees that, yes, it's commonplace in all sorts of situations.

And we're not -- we're not, you know, strictly speaking objecting to a lot of what they want to say. This historical review of white racial rhetoric and the fact that the instant defendants borrowed wholesale some of those phrases, we're not objecting to that. We're not objecting to using their own words and showing how it ties in with some of the groups that they are talking about in the past, even though that might technically be inadmissible evidence. I think even that is proper.

But what we're saying is they go beyond just saying look how similar this is, look how some of the rhetoric they use actually stands for something else, and they move to this is a conspiracy. This is -- they are lying to you when they say something else. And I think that even in the criminal context in the Fourth Circuit that's an attack on witness credibility, an impermissible attack. They can give all that data, but the taking of that next step has to be the province of the lawyers, you know, making legal argument, if that's what it means.

THE COURT: All right. In case I forget, I'm going to ask you to file with the Court a list of all the specific things you objected to now to be sure that I have them, okay?

MR. KOLENICH: Yes, sir, thank you.

THE COURT: All right, sir. Counsel for plaintiffs?

MR. BLOCH: Thank you, Judge. Judge, this is Michael Bloch on behalf of the plaintiffs, and it's our position that the motion to exclude expert testimony should be denied in its entirety.

I want to be very precise about what the experts intend to testify to and what they do not intend to testify to. Mr. Kolenich, I believe, both in his argument today as well as in his papers, has mischaracterized the intended scope of their testimony. Properly characterized, Judge, this type of testimony has been routinely found by courts to be relevant, reliable, and helpful to juries in complex cases like this.

So just to be very clear about what the experts will not testify to, they will not opine on whether or not there is a conspiracy. I think Mr. Kolenich just said they -- they will say this is a conspiracy. They will not say that. They will not offer testimony that this is a conspiracy. They will not opine on what any particular defendant intended. They will not opine on any defendant or witness' credibility. They are absolutely not going to say that any witness is lying, and

they do not say -- they do not state any sort of legal conclusion.

Obviously, if there's a concern about that at trial, that can be dealt with on an objection-by-objection basis at trial, but -- but I'm here to say that, properly characterized in this report and their testimony, they will not offer those opinions.

I think it's important to contextualize the individual statements that Mr. Kolenich has plucked out of this 63-page report. Because I think with the proper context it's clear that this sort of testimony and the particular testimony they will offer is absolutely permissible within the Fourth Circuit and across the country.

As Mr. Kolenich notes, there's no objection to reliability or qualifications or methodology. These professors are distinguished award winning sociologists. They have spent 60 years collectively studying and writing about the White Supremacist Movement. And what they have found in their vast experience and what they intend to testify to is that there is a distinct culture within the White Supremacist Movement going back 150 years that has its own language, its own tools, it's own tactics. It's what the experts define in their report on page 29 as the core characteristics of the White Supremacist Movement.

Some of those characteristics include a racist

ideology, and I'm pulling from page 29 of the report, the use of double speak to create plausible deniability for their ideas and actions. The conscious --

THE COURT: Well, just a minute. I mean, that's not unique to the Supremacy White Movement, is it? I mean, what's unique to the White Supremacy Movement, is it --

MR. BLOCH: It's one of what these experts find to be an essential feature of white supremacists. I agree with you, there are other types of organized crime and types of gangs, for example. There are plenty of groups and actors in society that also make use of double-speak. But these experts find that that is one particular feature of white supremacists as well.

I would analogize, Judge, to one of the cases we cite in our brief, which is *United States v. Wilson*, an Eleventh Circuit case, which I will discuss a little bit in a little bit more detail, but in that case Bloods street gang experts were allowed to testify about, essentially, the core characteristics of Bloods gangs. And in addition to coded language, those experts find that, for example, wearing red is a core characteristic of Bloods gang. Wearing red, obviously, it's not something unique to Bloods gangs, but it is something that those experts were allowed to say was a distinctive characteristic of Bloods.

So in addition to those items, Judge, these experts

will also opine that there is an insider language and codes, including frequent references to violence and genocide. And various specific tactics that white supremacists have used throughout history to commit, facilitate, and promote the use of violence.

Once they have established those core elements of white supremacist culture, which it was my understanding there was no objection to by Mr. Kolenich, they then examined the specific language and conduct that these defendants used, and they note the consistency between the defendants' language and conduct and the language and conduct that constitute those core characteristics of the White Supremacist Movement.

Generally speaking, their opinion, I think, can be summed up by a phrase they use on page 63 in the conclusion that defendants utilize White Supremacist Movement tactics in planning Unite the Right. They also put it defendants reflect --

THE COURT: Well, why is it important that you show these are white supremacist tactics? Why isn't it sufficient just to prove that you had a conspiracy here and this is what they did?

MR. BLOCH: Well, I -- I would say two things, Judge: As -- you're right. It is our burden to show that there is a conspiracy. And I believe showing that they are familiar with and immersed in a culture of white supremacy

that has its own shared ideals and language and tactics is relevant to our being able to argue that they were part of a conspiracy. That's number one.

And again, I would (internet disruption) case of *United States v. Wilson* which we cite in our brief. If I could just pull up a quote from that case. That court which allowed the Bloods testimony and allowed the expert to testify as to the core characteristics of Bloods and allowed the Court to testify that the specifics -- the defendants in that case acted consistently with what Bloods do historically --

THE COURT: But the Bloods are an organized group, aren't they?

MR. BLOCH: They are.

THE COURT: And the White Supremacy Movement is just ideas, people with similar ideas communicating to one another. They don't -- I gather there's no president, there's no organization.

MR. BLOCH: That's true, Judge. What these experts are prepared to testify to is that there's a distinctive culture within the White Supremacist Movement, and that, I think, Judge, is no different from a slew of cases that allow similar testimony to similar amorphous movements, such as cases in the Fourth Circuit that allow experts to testify about Islamic extremism; cases that allow experts to testify about drug traffickers do generally and what drug traffickers

do and say; or cases, for example, that talk about specific discrete tactics of child molesters, which is not, obviously, an organization, but is a -- is a somewhat definable group that has its own sort of set of distinguished distinctive language and culture. All of those sorts of experts --

THE COURT: Well, how -- how do these experts know that it's distinctive if -- I mean, I know the experts regarding the White Supremacy Movement, but how do they know it doesn't permeate to society and be this (internet distortion) other groups, too.

MR. BLOCH: Well, I think part of it is the experts go through it in terms of their methodology in making that determination, which was incredibly methodical as laid out by these experts in their report and not challenged by Mr. Kolenich.

But I think it goes back to your earlier point, Judge, that it's not saying that these particular tactics are unique to white supremacists. It is a tactic that white supremacists historically have relied on and there has been a distinctive culture that has developed that makes use of these language and tactics.

THE COURT: Well, you know, you could say the Nazis had this particular language, I mean, did these things. One could also say the CIA probably used similar tactics, they had different motives, different ideas, one we would say is good,

the other not. But I don't know why it's just insufficient to prove the conspiracy between the defendants if it can be done. I mean, you quote the -- you know, give the emails between them and it would be as simple as proving any other conspiracy. It's rare, you know, in the major drug conspiracy that we have, you know, evidence about the international drug trade and all that. We deal with the conspiracy before us.

MR. BLOCH: Judge, we -- we certainly can and will offer direct evidence of the conspiracy, but the question here is whether the -- the testimony that these experts are prepared to offer is helpful to the jury in making that determination.

THE COURT: Well, what -- I mean, what is it that the jury could not understand from the evidence? I mean, we try conspiracy cases all the time, and the very -- I mean, if you've been in a drug case, you know, it's -- it's not a tough thing to prove a conspiracy.

MR. BLOCH: Well, two things, Judge.

What will be helpful to the jury along those lines from these experts is the interpretation of the coded language and the deceptive tactics that these defendants used for the very purpose of making it more difficult for law enforcement to be accountable after the fact.

So these experts will testify, for example, that when -- when these defendants used the number 88, for example,

that that is not an innocuous reference to a number, or to a racecar driver, for example, as one of the witnesses has testified to. That, in fact, is a reference to Adolf Hitler, that -- and it's a reference that's well-grounded in a distinctive --

THE COURT: Right. And that's exactly the thing that I think is admissible. I don't see any problem with that.

MR. BLOCH: Judge, there are --

THE COURT: That's like saying that "H" stands for heroin or something like that, or "girl" means "cocaine".

MR. BLOCH: Right. And I would say a couple things in response to that, Judge.

Number one, there's plenty of case law that says that the admissibility of that kind of testimony is not just limited to interpretation of coded language. It's also -- they are also allowed to discuss conduct and situate it within the context of the larger culture and explain why this particular conduct historically is not itself innocuous.

So in this case, for example, the defendants spend a great deal of time in the lead up to Unite the Right promoting a idea within their followers that they are threatened -- that there is an imminent threat to the white race and it comes from Jewish people and black people.

The defendants will claim, as Mr. Kolenich has done

today, that that is part of a sort of speech that leads up to a political rally that they were planning. These experts will testify that speech like that is a tactic, a well-established tactic well-grounded in white supremacist culture that is designed to make the -- make followers of white supremacy feel like there is a threat of imminent danger and has to acting accordingly.

As the experts point out, these sorts of -- that sort of language is specifically designed to evoke outrage and encourage a response. That has happened historically in white supremacy culture, and these defendants do that in this -- in this case. And the experts are prepared to say that that sort of language is not just innocuous racism. It's in fact a well-designed tactic designed to encourage and facilitate violence.

THE COURT: Okay. In this case, now, are you asking -- will you be asking the jury to attribute to these defendants violent acts by persons who are not named defendants?

MR. BLOCH: Well, Judge, what we --

THE COURT: Or associated with the named defendants?

MR. BLOCH: We -- what we -- we will establish that -- we attempt to establish as a conspiracy to commit race-based violence. That the way -- the manner in which these defendants engage in that conspiracy, some of which was

to commit violence themselves, some of which was to encourage others to commit violence. And so we will -- the violence that was committed at Unite the Right, by and large, we will attribute -- exclusively we will attribute to either the defendants committed it or the defendants were in some way responsible for facilitating it and that the violence was reasonably foreseeable to each of these defendants.

THE COURT: Go ahead.

MR. BLOCH: So generally speaking, what these experts do is they define these core characteristics, and they opine that certain tactics that the defendants use are consistent with those characteristics.

As you know, Judge, and as laid out in our brief, the -- and I won't go into too much detail about this, courts routinely allow experts like social scientists to testify about distinctive tactics or language of certain groups. And as I mentioned, it's not just well-defined groups. It's drug smugglers; could be specific gangs; could be Islamic extremists. These are all examples from cases cited in our brief, many of which are within the Fourth Circuit. That case law is not just limited to interpretation of language, but it's also -- it also deals with specific conduct of defendants. I would just note *United States v. Chastain*, which is an Eleventh Circuit case where an expert -- expert testimony was permitted on the subject of general techniques

of drug smugglers to discuss certain modifications that were made to the defendant'a airplane, in that case, that made it more suitable for drug smuggling. And this I think goes back to one of your questions, Judge, that the Court in that case found that this information was clearly relevant to establishing the existence of the conspiracy because those defendants in that case were familiar with a shared set of tactics and a shared set of ideas.

Another set of cases that deals with conduct specifically in a sort of amorphous group is cases that deal with grooming techniques of child molesters, such as *United States v. Romero*, a Seventh Circuit case from 1999.

In that case an expert, who was an expert in social exploitation of children, was permitted to testify about the types of conduct child molesters typically engage in opining that certain actions by the defendant, "Would be some indication that the offender in question would act upon his fantasies."

The Court recognized the value of that expert testimony in explaining complicated criminal methodology that may look innocent on the surface but is not as innocent as it appears, which is the essence of what we have to deal with at trial, is the defendants complaining that all of their conduct is innocuous and joking and just a political rally. In fact, they are making use of tactics and language that is not

innocuous. It may seem innocuous, but that's why courts have permitted experts such as ours to explain how historically those sorts of tactics are not innocuous.

Judge, with respect to the specific claim by Mr. Kolenich that experts will opine on credibility or that this is a sort of sophisticated way to sort of just opine on credibility, it's absolutely not that. He mentions the part of the report where they talk about joking. These experts note in their report, and they will testify, that claiming certain violent intentions is just a joke, is a form of double-speak that white supremacists have engaged in for decades. The report actually cites to an article from 20 years before Unite the Right that talks about how the Klan has used this tactic of claiming that they are joking to obscure their violence for -- for decades.

The experts will not say -- to the extent a defendant comes in and claims we were just joking, these experts will not say that defendant is lying, or that defendant was not joking, or that defendant is not credible. What they will say is that there is a tactic of claiming you are lying. It goes back decades in the White Supremacist Movement. And that it appears that these defendants have utilized a similar tactic. It will be up to the jury to decide whether or not that defendant is credible when that defendant claims he's lying -- sorry, he's joking.

The cases that talk about credibility -- and Mr. Kolenich cited a case just now, a new case that was not cited in his brief, so I haven't had a chance to review it, but the cases that are cited in the briefs and, generally speaking, the cases that talk about opining on credibility, prohibit expert testimony where an expert specifically opines on the credibility of a specific witness and says this particular witness is lying, or this particular witness is not capable of telling the truth. For example, a psychologist that -- that's how this usually comes up, is a psychologist or psychiatrist would testify that this particular witness is not capable of telling the truth. That particular testimony is -- is permitted. And these experts won't come anywhere near that. The claim that "I was just joking" is a tactic well-established in the White Supremacist Movement

I would also note, Judge, in *U.S. v Lee* which Mr. Kolenich cites makes this point explicitly. Courts recognize that just because an expert's testimony might impact someone's credibility doesn't make it inadmissible. What Lee says is, quote: "No constitutional provision, law, or rule requires the exclusion of expert testimony simply because it concerns a credibility question."

That's -- if -- if experts were not allowed to testify about anything that implicated credibility, there would be far less expert testimony. It may create an

inconsistency with certain defendants' testimony, but it's not opining on any particular defendant's credibility.

And the other -- I think as I look at the list of individual contextual lines that Mr. Kolenich has pulled out of the brief, it seems like the vast majority of them deal with commentary on violence. And so I just want to deal briefly with how these -- how these experts actually discuss violence and how they intend to discuss it at trial.

Like double-speak and like language, they note in their brief that there are well-established tactics, ways, in which white supremacists have historically facilitated and promoted violence. And what they say, and I'm quoting from page 2, what -- the opinion that they render is, "The race-based violence facilitated and committed by defendants at Unite the Right is emblematic of white supremacist tactics."

I mentioned one of the ways that they promote violence. Another way is -- goes to a line that Mr. Kolenich pulled out of the brief, is they note that, historically, white supremacists have glorified violence in an effort to encourage others to commit violence. They do that by promoting and celebrating prior acts of violence by previous white supremacists like Dylann Roof or Adolf Hitler. And they -- they note that the white supremacist culture encourages the emulation of violent white supremacists by celebrating prior acts of violence. And they do it, Judge, in

characteristically coded deceptive ways.

So in -- for example, in the lead up to Unite the Right, they won't necessarily -- sometimes they will, but they don't generally always say you should do what Dylann Roof did, or you should do what Adolf Hitler did. They use -- they use coded language. So in the case of Dylann Roof, for example, there's a reference on (internet distortion) to someone saying, and it's mentioned in the report, quote, "I'm showing up with a bowl cut." A bowl cut is the haircut that Dylann Roof used when he murdered nine people in the church in South Carolina. So this participant on the Charlottesville 2.0 server, the planning server that was used to plan the rally, says, quote: "I'm showing up with a bowl cut this time and got to take the whole city to church."

To outsiders, that may appear to be an innocuous reference to haircut. These defendant -- these experts note that that's not what it is. Bowl cut is actually a specific reference to a horrific act of violence committed by a white supremacist. And language like that is designed to encourage others to emulate that behavior.

There are -- I won't go into it all. It's all in the report. But that's the way in which they will discuss violence. It's specific tactics that are often coded that serve to encourage violence. And again, that kind of testimony is --

THE COURT: I can see that you could testify as to what the haircut means. You know, it's -- you know, it's associating yourself with Roof. But I think to take that -- I'm a little concerned that being able to go with that and say that person is encouraging someone to do what Roof did in Charlottesville, seems to me that's a -- right much of a stretch.

MR. BLOCH: Judge, they do not intend to say that person was encouraging violence. They don't go that far. They will not opine that any specific person intended anything.

What they will do is say that "This is -- this is what the reference to Dylann Roof means. This is what the reference to haircuts means." But they won't take the final step of saying, therefore, we conclude that that person meant X, Y, Z. That's up to the jury to decide. But that kind of testimony I think is helpful to the jury because it gives context and helps the jury interpret language that is intentionally designed to conceal from outsiders violent intent.

The -- this kind of testimony, Judge, and --

THE COURT: I mean, why -- why isn't that just the guy said, "I'm going to Charlottesville and I'm going to dress like Dillon Roof."

MR. BLOCH: Well --

THE COURT: I mean, you know, I think Freud said, "Sometimes a banana is just a banana." I mean, why is that encouraging, necessarily encouraging -- like I say, he's encouraging people to dress like the guy, you know, and express his -- you know, his sympathy with the same kind of conduct.

MR. BLOCH: Judge, that -- fair question. And the answer is: If in fact is the case, which these experts say it is, that that sort of language has a well-defined preexisting meaning, meaning pre -- before that person ever made that comment, those words typically in this particular culture meant a certain thing, then that testimony about that context has been deemed --

THE COURT: Okay. Well, what did it mean when he says, "I'm wearing a bowl haircut"? I mean, we know who he's emulating there. But what is -- what is the message that they are saying that conveys?

MR. BLOCH: They will say that there's been a historical well-established tactic of glorifying violence for the purpose of encouraging others to commit violence. So that historically, before Unite the Right was ever an idea, white supremacists have been encouraging their followers to commit violence by making specific references like this to Dylann Roof or Adolf Hitler or other violent white supremacists. And so that is a particular tactic that white supremacists have

used to encourage and facilitate violence.

They then will, and I believe can, under the case law say something to the effect of that -- this particular comment about the bowl cut appears to be an example of that kind of tactic. We don't know what that particular person meant when that person said "bowl cut". It's always conceivable, and, perhaps, the jury could come to its own conclusion that that person really was talking about haircuts. What these experts will say, and I think is --

THE COURT: Well, he said -- there's no question he's talking about a haircut like this person he admires, and the person he admired killed people in the church.

But I don't think you can ask the jury on that statement to say that person was urging people to come and kill people in Charlottesville. I mean, I don't think an expert can testify to that.

MR. BLOCH: Well, again, I don't think they -- I don't think they will make that last step. And I think, if they come close to it on any of these points, Mr. Kolenich can object to it at trial, and we can deal with it on an objection-by-objection basis at trial.

But I think this is an example of -- the "bowl cut" statement is an example of both coded language, as well as a destructive tactic. That is normalizing violence, or encouraging violence, within the group so that others might

act.

And if it is in fact true, which these experts say it is, that that is something that over and over again from the beginning of their existence white supremacists have encouraged others to commit violence in this particular way, I don't believe that testimony is improper even if it is in fact true that -- that the jury may come to a conclusion about what this particular person intended. The experts won't say this person wanted violence. They will say this is an example of a tactic that we have seen developed in the culture over 150 years.

I don't think it's different, Judge, in my view, from, for example, testimony that -- I'm looking at *United States v. Torralba-Mendia*, which is cited in our brief, 784 F.3d 652, Ninth Circuit case from 2015. That in a case charging a, "Conspiracy to smuggle undocumented immigrants," the expert was allowed to testify about what they called common practices -- what they called common practices of alien smuggling operations.

The Court said that evidence about the smuggling -- the smuggling organization's methods helped prove the existence of a conspiracy and put the defendant's actions in context.

I also think it is entirely on all fours with *United States v. Wilson*, Eleventh Circuit case from 2015, where,

again, the charge was conspiracy to possess firearms and further the crimes of violence. This was the case where defendants were members of the Bloods gang. And that gang expert in that case identified that, quote, Gang culture had spread all over the country. That expert, Quote, Identified several gang identifiers that were unique to Bloods, including that, quote, Blood gangs generally committed violent crimes and carried firearms.

And I would note, Judge, which goes to your earlier point, in that case the Bloods -- the sect of the Bloods gang that was at issue in that case was a gang in Alabama. This particular expert was an expert in Bloods gangs in California but was allowed to testify that there is a nationwide culture that has distinctive characteristics.

The expert in that case then reviewed the evidence in the case, interpreted statements in the case, opined that the conduct of the defendants committing the crime alleged was, quote, Conduct consistent with what he's seen in his experience among Blood gang members.

He stated he had reviewed certain evidence in the case, and when asked to comment on that evidence noted on the record several gang identifiers present therein and he reiterated the significance and the meaning behind each.

THE COURT: Well, but the difference seems to be, though, that the Bloods are an organized group. That when you

join the Alabama chapter of the Bloods you are taking allegiance to the group as a whole.

It's not like if you join -- you join some local group here that's -- or maybe one of these defendants' groups you don't take allegiance to white supremacy.

MR. BLOCH: Well, Judge, I would -- I hear that for sure. But there are plenty of cases, for example, that allow experts to testify about Islamic extremism, for example, that is I believe --

THE COURT: Well, they are the cases would be more -- more appropriate here, I think. Or closer, more analogous to --

MR. BLOCH: Right. Two things, Judge:

Number one, that -- a variation of the point you just made was raised in this Bloods case. And that's why I note that the Bloods at issue in this case were in Alabama. There was no specific allegiance to the specific Blood gang that this expert had expertise in. And nonetheless, the expert was allowed to say that there's a gang culture, a Blood culture, it sort of permeates the country, and there are distinctive characteristics of it.

But I agree with you. It's also analogous to cases that talk about -- that experts were allowed to talk about Islamic extremism in *United States v. Young*, which is a Fourth Circuit case from last year, an expert was allowed to testify

about the crossover between Islamic extremism and white supremacy. It's a very similar testimony from what these experts plan to offer in our case.

And I think one level removed from that are the cases that where experts are allowed to talk about what drug traffickers typically do or what drug smugglers typically do or what child molesters typically do. None of those cases involve a specific discrete gang, or a discrete group. But in all of those cases experts were aloud to opine that there is a distinctive kind of tactic that is well-established in these groups and that when the defendants in those cases do that tactic it is consistent with this tactic that we have seen within the culture. And that testimony is thought to be helpful to juries, and, therefore, admissible because it gives context to the conduct.

And I think, particularly, in a case like this where these defendants are going to claim that all of their language and conduct was innocuous, it is helpful for a jury to be able to say, well, at least within the culture that these defendants are a part of, it has been our opinion that that conduct or that language is not in fact innocuous.

THE COURT: Okay. Let me ask you about on page 60 there's an opinion that begins: "When defendants extended the white supremacist culture into the Charlottesville 2.0 and associated servers on Discord they likely knew that with some

encouragement users would urge each other toward the vision for Unite the Right in the specific ways that the defendants desired."

Is that an -- that's pretty much an opinion that there was a conspiracy.

MR. BLOCH: Judge, I'm sorry, I'm finding the quote.

Well, I'd say a few things. Number one, as I mentioned, they will not say that there's a conspiracy.

What they do say, and I think is consistent with this comment, is that there is a distinctive culture; it does include these tactics. These defendants were knowledgeable about the culture and that culture seems to have infused the Charlottesville 2.0 server based on the language that we have seen defendants use within the server.

And so that -- that I think is the intention of the testimony. And again, if there's any concern that they go too far, which -- which they won't, that can be dealt with on an objection-by-objection basis at trial. But they will not opine that there's a conspiracy. They will not opine as to what any specific defendant intended.

THE COURT: All right.

MR. BLOCH: There are -- I just want to mention very briefly two arguments that were raised in the brief, in the reply brief, that I wanted to respond to also --

THE COURT: All right.

MR. BLOCH: -- referenced today.

The cases that talk about experts stating legal conclusions are far from what these experts intend to do.

I'm quoting from *U.S. v. McIver*, which is a case that Mr. Kolenich cites in support of his claim that these are legal conclusions that these experts intend to offer. And what that case says is that the cases that preclude expert testimony for rendering legal conclusions are where, quote: "The terms used by the witnesses have a separate distinct and specialized meaning in the law different from the terminology they typically use in their everyday vernacular, such as rendering an opinion that defendant's actions constitute extortion or that," in that case, "a dog bite constituted deadly force."

These experts will not render any sort of opinion like that. They -- again, they won't say what anybody intended. They won't say there's a conspiracy. They interpret language. They contextualize conduct within the culture of the White Supremacist Movement. None of that comes anywhere close to the prohibitions on rendering legal opinions as defined by the case law.

And finally, Judge, Mr. Kolenich makes an argument that this testimony may run afoul of Rule 403. And I would just note that many of the cases that we cite that allow expert testimony on distinct groups, on amorphous groups, also

consider challenges under Rule 403. All of them reject those challenges under 403.

I have not seen a case that -- that -- that disallows this sort of testimony under Rule 403. Mr. Kolenich doesn't cite one. And I would just point to one of the cases we cited, *United States v. Hassan*, Fourth Circuit case from 2014. Considering the 403 argument raised in that case, the Court said, quote: Although linking the appellants to extremist Jihadist groups was undoubted prejudicial, it was not unfairly so. Indeed, the charges, which were conspiracy in that case, that were lodged against the appellants meant that the prosecution would necessarily seek to establish that link.

Finally, Judge, I would note that, generally speaking, it is our burden to prove that the defendant conspired to commit racially motivated violence. To do that we need to discuss the motivations of the defendants. And the motivations of defendants are made clear through language and conduct. This is a culture, as the experts will explain, that speaks, essentially, in code and symbols about violence. And it's our view that the jury won't understand that unless these symbols and tactics are decoded for the jury.

The answer I believe, Judge, is not to exclude that testimony. It is for the defendant to cross-examine the experts, or for the defendant to put on their own expert. I

will note that -- that the defendants in this case chose not to depose these experts. They chose not to put on a rebuttal. Instead, they filed this motion. The answer to many of the concerns that Mr. Kolenich is raising is to cross-examine, to object at trial if there is a individual opinion that appears to go too far, or to put on their own evidence.

But consistent with the spirit of Rule 702, which is to exclude -- which is to allow expert testimony, that it should be an exception and not the rule to limit or exclude expert testimony, the answer here is not to exclude but is to allow defendants to challenge at trial through the various means that are available to them.

THE COURT: All right. Thank you.

Defendant wish to respond?

MR. KOLENICH: Just generally, Your Honor, I don't believe that Mr. Bloch's presentation of what the experts intend to say and what they will not say is consistent with the report that we got. As to not -- given contrary experts, obviously, there are financial limitations on these defendants. Obviously, we would have liked to do that, but this is all they could afford.

I understand cross-examination and making objection at trial. However, I don't think that's proper for me to rely on that where there is certain parts of their presentation that exceed what the law allows. So we disagree with

plaintiffs that there is no attack on witness credibility or reaching of legal conclusions. We think it's pretty explicit in various parts of the report.

Now, relying on the Court's order to me to make additional filings as to what specifically we're objecting to, I would like to get the transcript of this hearing and I'll go ahead and make that filing. Other than that, I'm pleased with our presentation for the defense this morning and thank the Court for hearing us.

THE COURT: Okay. There's one other matter I think we need to discuss pretty soon, and maybe now is the time. We have this case set I think to be tried in April and we have an alternate date in October. I, frankly, can't see any way that we're going to be able to try a case in April, I don't think. We're talking about being in a courtroom with more than 50 participants, I would think. Considering all the plaintiffs, all the defendants, all their attorneys and their associated people who have to be there.

It seems to me we probably ought to be going on and just saying, look, we'll try the case in October. I don't see the vaccine being readily available, and we don't want to get into start this case and have one lawyer get sick and have -- I mean, there are too many moving parts, and one could go wrong and we'd have to stop the trial, possibly have to stop the trial.

Any feeling about that from the plaintiff or the defendant?

MR. KOLENICH: For the defense, Your Honor, I understand what you're saying, and I concur that at least where I am in Ohio there's not going to be much, if any, vaccine to the general population by April. So there's no objection to moving the trial off of April from my clients.

MR. BLOCH: Judge, I certainly appreciate the Court's concern. I guess all I would ask is, obviously, there are a lot of parties, a lot of lawyers on this side and a lot of parties, and I know that our clients, as have everybody, have waited a very, very long time to get this case tried. I guess I would ask for an opportunity to just discuss amongst our team and respond.

I know that we were very hopeful that we would get the case done in April. That said, obviously, safety is the most important thing and we don't want to jeopardize anybody's health.

THE COURT: Right. Well, I mean, I'd like to get it done in April, too, because we've got a number of cases that -- criminal cases are our priority, and we haven't had a criminal trial I think since February now, and we've got some of those stacked up. And I don't think we'll get to those in April, either.

So anyway, I'll, you know, give you an opportunity

to speak to your people, but I think I'm going to make a decision pretty quick, and I think we have to, you know, be practical about it and err on the side of safety. But also, just we can't go into it with the hope that everything will work out. We know that it doesn't work that way when you've got this many moving parts that this case has to go wrong.

So if you want to talk to your people, let me know something quickly, but I'll -- the Court will have to -- it's not necessarily going to be the opinion of any one person. I mean, the Court will have to make the decision based on what, you know, the sign says out there regarding where the COVID will be in April.

All right. Thank you all.

MR. BLOCH: Yes, sir. Thank you, Judge.

THE COURT: We'll recess.

MR. KOLENICH: Thank you.

(The proceedings concluded at 11:09 a.m.)

CERTIFICATE

I, Mary J. Butenschoen, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Mary J. Butenschoen, RPR, CRR 12/23/2020